March 17, 2014

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Re: MBTA RFP No. 159-12
Notice of Award dated January 8, 2014

Dear Mr. Lewin:

This letter serves as my decision of the bid protest filed by the Massachusetts Bay Commuter Railroad Company ("MBCR") on February 7, 2014, as supplemented. The first portion of my decision provides an overview of the procurement, following which I have made determinations concerning MBCR's asserted grounds for protest.

1. **Overview of the Procurement**

The MBTA Staff Summary Sheet to the Massachusetts Department of Transportation Board of Directors (the "Board"), which is attached to this letter, provides a useful chronology and serves as a reference for my determination.

2. **Procedural rules governing MBCR's bid protest**

On January 8, 2014, the Board voted unanimously to award Contract No. 159-12 (the "Contract") to Keolis Commuter Services, LLC ("Keolis"). The Appeal/Protest Procedures incorporated into the RFP provided that any post-bid protest must be filed within three business days of the Notice of Award Determination date. At MBCR's request, the MBTA granted an additional thirty days. On February 7, MBCR submitted its original bid protest. MBCR submitted a First Supplemental Protest on February 14, and a Second Supplemental Protest on February 27 (collectively, the "Protest").

The RFP provides that "the protest or appeal shall be made to the Chief Procurement Officer" and that "[i]f the interested party does not agree with the Chief Procurement Officer's determination, he/she may appeal to the Authority's General Counsel in writing within three (3) business days of the Chief Procurement Officer's determination." In adjudicating the interested party's second appeal,

[t]he General Counsel will review all facts of the appeal and will notify the interested party of his decision within five (5) business days. If the matter requires further evaluation, the General Counsel will notify the protesting party in writing (by facsimile or U.S. mail) of the extended review period. A final response will be issued by the General Counsel upon final review of the matter.

3. **The legal standards applicable to MBCR's bid protest**

The MBTA is an independent political subdivision of the Commonwealth, created by statute, G.L. c. 161A, § 1 *et seq.*, with broad powers to establish transit facilities and provide mass transportation services to the Commonwealth. *See MBTA v. Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 542-543 (1965). The bid protest at issue here concerns the award of the MBTA's commuter rail services contract.[1]

It is not enough for the protestor simply to disagree with the MBTA's evaluations. *See Blackwater Lodge & Training Center, Inc. v. U.S.*, 86 Fed. Cl. 488, 514 (2009) ("[m]ere disagreement with an agency's handling of a procurement matter falls short of meeting the burden of proving that the process was arbitrary and capricious.").[2] Rather, the law sets a high standard for reversing a selection committee's findings.

In rendering its decision, the selection committee is required to determine "which bidder would best serve the public interest," and its final decision may only be upset if there is a showing that the selection committee "acted corruptly or in bad faith or so unreasonably or arbitrarily as to be guilty of a plain abuse of discretion." *Slocum v. City of Medford*, 302 Mass. 251, 254 (1939); *see also Cubic Transp. Sys., Inc. v. Massachusetts Bay Transp. Authority*, 2002 WL 31957004 at *4 (Mass. Super. Dec. 12, 2002) ("it is to be inferred that the awarding of contracts is left to the reasonable judgment of the [ ] officers charged with responsibility therefor[]" and to upset their decision "some showing of illegal or arbitrary action" is required) (internal quotation omitted). Absent such a showing, the selection committee's findings should not be upset. *Id.*

Additionally, a protestor must show that the alleged misconduct or violation caused it prejudice. *See United Enterprise & Assocs. v. U.S.*, 70 Fed. Cl. 1, 16 (Fed. Cl. 2006) ("the protestor must show that there was a substantial chance it would have received the contract award absent the alleged error.") (internal quotation omitted).

Here, as the commuter rail contract is highly technical in nature, a large degree of deference is due to the selection committee's findings, as the committee brought a measure of

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1 Because the award does not concern construction services, G.L. c. 30, § 39M and G.L. c. 149, § 44A do not apply. *See, e.g., Thorn Transit Systems Intern., Ltd. v. Massachusetts Bay Transp. Authority*, 40 Mass. App. Ct. 650, 652-56 (1996) (discussing the circumstances where G.L. c. 30, § 39M and G.L. c. 149, § 44A apply to MBTA procurements).

2 Federal bid protest decisions are not binding on the MBTA. However, I refer to them for guidance, where useful and appropriate.

knowledge and experience to the task of assessing the qualifications of bidders. *See Boston Harbor Commuter Service, Inc. v. Massachusetts Bay Transp. Authority*, 46 Mass. App. Ct. 122, 126 (1999) ("Qualification by MBTA of both Commuter Service and Harbor Cruises was, therefore, a reasonable decision by the awarding authority, which brought a measure of knowledge and experience to the task of assessing the qualifications of the bidders."); *cf. Olympic Cleaning, Inc. v. Massachusetts Bay Transp. Authority*, 2005 WL 2009436, at *7 (Mass. Super. June 9, 2005) (holding that "a determination of responsibility is left to the reasonable judgment of the officers charged with the responsibility therefor") (citation and internal quotation marks omitted). Similarly, a protest challenging an agency's independent cost estimate is insufficient to upset an award unless the estimate lacked any rational basis. *See CTA Inc. v. United States,* 44 Fed. Cl. 684, 693 (1999) ("decisions on cost realism are within the agency's sound discretion and expertise").

The selection committee's findings of fact cannot be controverted absent a showing of illegal or arbitrary action. *See Capuano, Inc. v. School Bldg. Comm. of Wilbraham*, 330 Mass. 494, 496 (1953). And the law recognizes that a committee is entitled to conclude that a bidder can perform a contract even if a certain amount of "tooling up" will be required. *See Boston Harbor Commuter Service, Inc.*, 46 Mass. App. Ct. at 126. Moreover, a proposal need not be rejected if the claimed defect is not material. *See M.W. Kellogg Co./Siciliana Appalti Costruzioni S.p.A. v. U.S.*, 10 Cl. Ct. 17, 26 (Cl. Ct.1986) ("[w]here a defect in a bid is trivial or a mere formality, not material, the bid is not required to be rejected out of hand").

In considering this protest, it also bears noting that the protesting party here was the highest bidder by a significant amount ($254 million). Even when there is no obligation to award the contract to the lowest bidder, the law recognizes that "[e]conomically, the public gains from [a] lower bid price." *Cubic Transp. Sys., Inc.*, 2002 WL 31957004, at *5.

With regard to this procurement, the MBTA's evaluation criteria were set forth in its Request for Proposals, Instructions to Proposers, RFP No. 159-12 (July 17, 2013) (the "RFP"). The RFP made clear that the MBTA would select "the Proposer that it determines is the most advantageous", *i.e.*, provides the "best value," *id.*, §§ 7 and 7.1, with a Proposer's Operations and Management Proposal being considered more important than its Financial/Price Proposal. *Id.*, § 7.1. The Proposal employed certain "Pass/Fail" Evaluation Factors for a Proposer's Legal, Financial Capacity, and Performance Guaranty submissions. *See id.*, § 7.1.1.1.

The RFP further provided that a Proposer's Financial/Price Proposal submission would be evaluated "to determine whether it is reasonable and responsible." *Id.*, § 7.1.1.3. The MBTA "reserve[d] the right to reject any Proposal in which any of the prices [were] significantly unbalanced to the potential detriment of the MBTA." *Id.*

Lastly, the rated evaluation factors and the overall Operations and Management Proposal were evaluated subject to certain adjectival ratings: exceptional, good, acceptable, potential to become acceptable, and unacceptable. *Id.*, § 7.1.2. The MBTA reserved for itself discretion to reject or keep under consideration proposals that did not meet stated RFP requirements. *See, e.g., id.*, § 7.1.1.1 ("Failure of any single pass/fail requirement *may* result in rejection of the Proposal.") (emphasis supplied); *see also id.* at § 7.2 ("If a response is not provided prior to the

deadline for submission of the response, the Proposal may be declared non-responsive."); *id.* ("The MBTA may waive minor irregularities in the form of the Proposal that do not alter the quality or quantity of the information provided.").

4. The MBTA's procedures for evaluating the competing bids

My evaluation of MBCR's Protest begins with a review of whether the MBTA established and followed a procurement process that safeguarded the integrity of the Proposal evaluation process. I conclude that it did. A brief description follows.

The MBTA established a comprehensive procurement evaluation process that was approved by the General Manager. The General Manager appointed the Evaluation Organization, made up of the Selection Committee and supporting Evaluation Teams and overseen by a Procurement Management Team. The Selection Committee consisted of the MBTA's Deputy General Manager and Chief Financial Officer, the Chief Operating Officer, and the Chief of Strategic Business Initiatives. Evaluation Teams were comprised of subject matter experts from within the MBTA or MassDOT. The Evaluation Teams were supported by third-party experts and consultants.

a. Confidentiality

Safeguarding the confidentiality of the Proposers' submissions was essential to protecting the integrity of the evaluation process. The MBTA implemented strict and thorough measures to ensure that each Proposer's information was protected not only from public disclosure, but also from disclosure to the other Proposer. All personnel involved in the evaluation process were required to sign confidentiality agreements acknowledging their obligation to maintain the Proposers' information in strict confidence. The Proposals themselves were kept in secure, off-site locations. Physical access was restricted and secure pass cards were required to access the elevator and evaluation space. No materials were permitted to be removed from the secure locations. The Evaluation Teams and Selection Committee were assigned dedicated, password protected computers. Removable drives and flash drives were prohibited except as specifically authorized by the Procurement Management Team and, if used, were not permitted to be removed from the secure locations. There was no fax machine, nor were there internet connections to the Evaluation Teams' or the Selection Committee's computers. With three exceptions, all cell phones were required to be checked in and left in the reception area, outside the evaluation space. Three individuals, the Chief of the MBTA Transit Police, the MBTA's Chief Operating Officer, and the MBTA Senior Director of Rail and Water Transportation, were authorized to carry cell phones for security purposes. Surveillance cameras were installed to monitor security. I find these security measures to have been more than reasonable.

b. Evaluation Process

Proposals were submitted in separate parts: (1) the Operations and Management Proposal (the "O&M Proposal") and (2) the Financial/Price Proposal. O&M Proposals were evaluated first, followed by the Financial/Price Proposals.

The Selection Committee rated eleven "adjectival" evaluation factors set out in the O&M Proposal (I address below the specific evaluation factors at issue in the Protest in Sections 6 and 7). The Selection Committee was supported by the Evaluation Teams (*i.e.*, subject matter experts) throughout the evaluation process. The Selection Committee and Evaluation Teams used written evaluation worksheets to record their judgments about the substance of each Proposal as it related to the stated criteria for each evaluation factor. The worksheets reflect fair consideration of the information provided by each Proposer, and show how that information compared to the stated criteria, and to each evaluation factor as a whole. Before the Selection Committee assigned final ratings for the O&M evaluation factors, it conducted Presentations and Interviews with each Proposer, giving them an opportunity to highlight the strengths of, and answer questions about, their Proposals. The Selection Committee ultimately assigned an overall rating of "Good" to Keolis' O&M Proposal, and a lower overall rating of "Acceptable" to MBCR's O&M Proposal. These ratings were assigned by the Selection Committee without knowledge of the content of each Proposer's Financial/Price Proposal.

The Selection Committee then evaluated the Financial/Price Proposals, which included three "Pass/Fail" evaluation factors and each Proposer's firm fixed price to perform the Contract. To help assess the reasonableness of the Financial/Price Proposals, the MBTA retained outside experts to develop an Independent Cost Estimate ("ICE") to determine the likely cost to operate and manage the commuter rail system in accordance with the requirements of the Contract. The ICE was not shared with the Proposers.

Keolis' Price Proposal over twelve years was approximately $254 million lower than MBCR's Price Proposal. Each was determined to be within a reasonable range of the ICE (Keolis 2.1% below, and MBCR 3.7% above).

The Selection Committee determined that Keolis' O&M Proposal and Financial/Price Proposal offered the best combination of technical quality and price, and recommended to the General Manager that the Contract be awarded to Keolis. The General Manager agreed, and made the same recommendation to the Board. The Board considered the recommendation and voted unanimously to award the Contract to Keolis.

I find that the evaluation process was well-designed, and it was effectively and deliberately implemented.

5. The Pass/Fail determinations and related issues

MBCR alleges that Keolis' Proposal failed to meet the RFP criteria for two Pass/Fail evaluation factors, "Financial Capacity" and "Performance Guarantee," and argues that the deficiencies should have disqualified Keolis, leaving MBCR as the sole Proposer. The arguments in MBCR's various protest submissions are not entirely consistent, but the thrust is that Keolis failed (i) to provide adequate assurance from its ultimate parents, Keolis SA and SNCF (together, the "Parents"), to unconditionally guarantee all of Keolis' obligations under the

Contract, and (ii) to provide a $20 million performance guarantee from each of the Parents.[3] I conclude that the MBTA's determination that Keolis' Proposal merited a "Pass" on these evaluation factors was reasonable and well within its discretion.

a. Financial Capacity

The stated objective of the Financial Capacity evaluation factor was to "identify Proposers with demonstrated capability to undertake the financial responsibilities associated with the Contract." The Selection Committee, with support from the Evaluation Team and KPMG, evaluated the Proposals on the basis of several enumerated criteria to determine whether, taken as a whole, the Proposer had "demonstrated [its] capability to undertake the financial responsibilities associated with the Contract."

One enumerated criterion was an assessment of the Proposers' "financial condition" as reflected in the audited financial statements of their equity members or the equity members' corporate parents (defined in the RFP Instructions to Proposers as a "Financially Responsible Party"). Keolis provided audited financial statements of each of the Parents. Initially, to the extent that the Protest asserts MBCR's subjective view that Keolis' Parents' financial statements reflect inadequate "financial condition," I note that the Selection Committee's evaluation and its conclusion that the Parents' financial statements satisfied the stated criterion were informed by KPMG's advice and expert opinion. This decision is well supported by the procurement record.

Another criterion of the Financial Capacity evaluation required an "appropriate letter" from each Financially Responsible Party the Proposer relied on, "confirming that it will guarantee all the obligations of the entity as applicable, with respect to the Contract." Additionally, the Proposer was required to provide a description of how the Financially Responsible Party "will financially support the Proposer . . . ."

Keolis' Proposal included letters from the Parents, confirming that each would provide its pro rata share[4] of the human resources needed to perform the Contract, as well as working capital of up to $18 million, plus a $20 million performance guarantee. The Selection Committee determined that this met the required standard. MBCR contends that the Parents' commitment fell short of guaranteeing "all the obligations of the entity as applicable, with respect to the Contract," and should have resulted in a "Fail" rating for the Financial Capacity evaluation factor. I disagree.

I do not agree that the Keolis Parents' agreement to provide, on a pro rata basis, the necessary human resources, as well as $18 million of working capital, plus a $20 million performance guarantee fell short of the stated criteria. First, though the meaning of "guarantee all of the obligations of the entity as applicable, with respect to the Contract," may be subject to interpretation, it cannot be understood without reference to the Contract (which the Proposers

[3] Although MBCR's challenge to the Performance Guarantee evaluation factor is raised somewhat obliquely, I have treated it as though it were raised directly.

[4] Keolis SA and SNCF indirectly own 60% and 40%, respectively, of Keolis.

received as part of the RFP). The Contract itself established the extent of the "guarantee" that was required of the successful Proposer: a parent company performance guarantee of "all obligations," *but not to exceed $20 million*. The MBTA's acceptance of the Parents' commitment to provide the $20 million guarantee, in addition to $18 million of working capital, plus the human resources required to perform the Contract, is consistent with a reasonable interpretation of the required financial commitment. Assigning a "Fail" rating to such a proposal, as MBCR contends was required, would have been unreasonable.

In any event, I note that under the terms of the RFP, it was the overall Financial Capacity evaluation factor that was subject to a Pass/Fail rating. There was, by necessity, a degree of judgment built into the criteria, evidenced most clearly by the use of audited financial statements to make a subjective determination of adequate "financial condition." The MBTA was entitled to review the strengths and weaknesses of each Proposer's submission as it related to the various stated criteria and determine whether the totality of the information provided demonstrated the Proposer's "capability to undertake the financial responsibilities associated with the Contract." Not only am I satisfied that Keolis met the stated Financial Capacity criteria, I am also satisfied that the Selection Committee's "Pass" rating for this factor was arrived at consistent with the evaluation guidelines established in the RFP.

By contrast, MBCR's contention that the RFP required an unconditional, unlimited "guarantee of all obligations" is inconsistent with the Contract. Had the MBTA sought a commitment to provide an unlimited guarantee, the Contract would not have included a $20 million cap. The MBTA's determination that Keolis satisfied the stated criteria and merited a "Pass" rating for the overall Financial Capacity factor was sound, and well within its discretion.

b. Performance Guarantee

The stated objective of the Performance Guarantee evaluation factor was to "identify Proposers with demonstrated ability to provide a performance guarantee that demonstrates a capability to undertake the associated Contract." The criteria for evaluating this Pass/Fail factor were: (i) provision of "a letter of credit commitment from a Qualified Bank [for] an irrevocable letter of credit in the amount of $20 million"; and (ii) "written confirmation from each Guarantor, stating that it is willing to provide a parent company guarantee in relation to the Contract and meeting the requirements" stated in the Contract. Among other things, the Contract expressly provided that the performance guarantee would be capped at $20 million.

Keolis submitted a letter of credit commitment from its bank, which MBCR does not challenge. Keolis also provided letters from its Parents confirming that they would provide the required performance guarantee, pro rata their respective ownership interests – *i.e.*, 60% by Keolis SA and 40% by SNCF. MBCR contends that each Parent was required to guarantee the full $20 million, and that the pro rata split left the MBTA with no choice but to assign a "Fail" rating for this evaluation factor. [5]

[5] Though it was not required by the RFP, in the final negotiations leading up to the contract signing each Parent agreed to guarantee the full $20 million, mooting this ground for protest. Nevertheless, I address the issue in order to clearly establish the history upon which MBCR bases this claim.

Again, my analysis is informed by the Contract itself, which required a performance guarantee of "all obligations," but only up to a total amount of $20 million. MBCR's position appears to be that if there are multiple guarantors, the MBTA was required to obtain a $20 million performance guarantee from each of them. For its part, MBCR provided a $20 million performance guarantee commitment from only one of its three equity members. In effect, MBCR opted to limit its members' exposure by deciding to leave two of them entirely off the performance guarantee. As a consequence, if MBCR's single guarantor were to default, the MBTA would have no recourse against the other two members, at least with respect to the guarantee. By contrast, Keolis chose to limit its Parents' exposure by having each provide only its pro rata share of the performance guarantee, but this arrangement made each Parent liable for its respective share. Under the Keolis Proposal, if one of the Parents were to default, the balance of the performance guarantee extended by the other guarantor would still be available.[6] The MBTA was within its broad discretion to decide that a performance guarantee allocating the risk of default between two entities rather than placing the entire risk on a single entity provided acceptable security, met the stated criteria, and supported an overall "Pass" rating for this factor.

c. Profit ratio

I address briefly a third ground on which MBCR asserts that the Keolis Financial/Price Proposal was deficient. MBCR cites a provision in the Operating Agreement requiring the operator to maintain a 1.02:1 ratio of revenue to cost ("profit ratio"), and argues that because Keolis' Proposal included no profit for year one, it cannot maintain that ratio. The argument fails for at least two reasons.

First, it is based on mere speculation about Keolis' future performance of the Operating Agreement. Keolis will not prepare financial statements from which compliance with the profit ratio can be determined until several months after it has taken over operation of the commuter rail. It is entirely possible that Keolis will have realized savings and efficiencies that are more than sufficient to cover the profit ratio, notwithstanding its zero profit budget forecast in year one. Second, MBCR overlooks that the Keolis Parents have committed to provide up to $18 million of working capital, which Keolis can draw on to satisfy the profit ratio, if needed.

6. The Adjectival ratings and related issues

a. Past performance on safety

During the Request for Qualifications ("RFQ") phase preceding the RFP, Proposers were required to disclose their ten-year history of "major accidents or events." MBCR alleges that Keolis' Statement of Qualifications ("SOQ") was "misleading and deceptive" because it failed to disclose "more than a dozen fatal accidents involving SNCF over the past decade." While it is

[6] MBCR also argues in conclusory fashion that SNCF is immune from liability under French and European Union law, and that its 40% share of the performance guarantee is illusory. This is incorrect. Specialized and competent European and United States counsel provided the MBTA with legal opinions that offered reliable and adequate assurances on these points.

not clear to me that a challenge to the MBTA's evaluation of Keolis' SOQ is timely, because the allegation questions Keolis' ability to run a safe commuter rail operation I have carefully considered MBCR's claim, the materials in the procurement record, and databases maintained by European and U.S. regulators. Having reviewed and considered those materials, I find no basis to conclude that Keolis' SOQ was deceptive or misleading.

The RFQ directed proposers to disclose:

> any major accidents or events related to the provision of rail services (including commuter rail services) in which the Proposer or any member of the Proposer's team was involved in the last ten years, in which one or more persons was killed or more than one person was seriously injured as well as any event in the last ten years that might reasonably call into question the Proposer's and/or member of the Proposer's team's ability to safely perform the Contract. For purposes of this RFQ, the term "accident" is not limited to incidents in which a collision occurred. At a minimum, "major accidents" and "serious injury" should include any incidents that resulted in a Federal Railroad Administration investigation (or foreign equivalent thereof).

Keolis' SOQ reported that "SNCF has not experienced any Safety Issues or Accidents in any of its referenced commuter rail services over the past 10 years." The MBTA requested a clarification, and Keolis revised its response to include a January 27, 2003, collision between an SNCF train and an Italian intercity passenger train.

MBCR asserts that SNCF failed to disclose fourteen additional events. Of those, European regulatory reports indicate that nine[7] involved trespassers, third-party recklessness at grade crossings, or similar events. For example, one involved a police chase through a grade crossing, and another involved trespassers on a railway bridge. Such "non-attributable" accidents are not considered to be the fault of the railway operator. MBCR's own SOQ relied on across-the-board, express disclaimers by MBCR and one of its members, Veolia Transportation, that they were not reporting "numerous grade crossing accidents and trespasser strike events which have resulted in fatalities and serious injuries [but] were not attributable to" the railroad. The MBTA accepted MBCR's exclusion of "non-attributable" accidents from its SOQ. Keolis' decision not to report such incidents was a reasonable interpretation of the RFQ instructions – indeed, that reading appears to have been shared by MBCR, Keolis, and the MBTA alike. That accounts for nine of the fourteen events on MBCR's list.

The circumstances of the remaining five events identified in MBCR's Protest indicate that while the "non-attributable" distinction may not apply, two[8] of the five events occurred well

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[7] Villeneuve (2007) (pedestrian hit while crossing tracks instead of using underpass); Cadaujac (2007) (car hit after bypassing closing barriers); Tossiat (2007) (truck hit due to truck driver's misreading of grade crossing conditions); Neufchateau (2008) (police chase bypassing closed barriers); Bayard Station (2008) (worker hit after bypassing closed barriers); La Plaine Stade de France (2009) (trespassers); Recquignies (2010) (car hit after bypassing closed barriers); Saint-Medard-sur-Ile (2011) (truck hit after bypassing closing barriers); Le Breuil (2011) (car hit after failing to stop to observe track before crossing).

[8] Amilly (2012) (two vehicles hit by train when crossing barrier opened too soon); Bretigny (2013) (four cars of passenger train derail and two overturn).

after Keolis submitted its SOQ and had been qualified to respond to the RFP. MBCR's accusation that Keolis deliberately omitted these incidents from the accident history report is simply wrong as a matter of chronology.

With respect to the remaining three events,[9] MBCR contends that Keolis hid them in a deliberate attempt to deceive the MBTA, but cites no support for that accusation. It is equally plausible that the omission was inadvertent or the result of differing interpretations of the RFQ instructions, particularly as to how they might apply to the European regulatory environment. There is no support at all for a finding, or even an inference, that Keolis intended to deceive or mislead the MBTA. Nevertheless, in an abundance of caution I will assume without deciding that these three incidents should have been disclosed, which is an assumption necessary to determine whether the disclosure of those three incidents would have caused Keolis' safety rating to fall from "Good" to "Unacceptable" (as MBCR argues). I conclude that it would have remained as is, *i.e.*, "Good."

The same safety standard should of course apply to both MBCR and Keolis. MBCR's disclosure included numerous accidents resulting in fatalities and serious injuries; one accident alone (in Chatsworth, CA, in 2008) caused 135 injuries and 25 fatalities.[10] Three other events disclosed by MBCR resulted in 178 injuries and 2 fatalities. Nevertheless, MBCR's accident history was rated "Good," which I interpret to mean that the number and severity of the reported incidents was consistent with (or better than) what safety experts would normally expect from a railway operation of similar scope. The materials provided by both Proposers in the course of the procurement establish that the size and scope of SNCF's railway operation far exceeds that of MBCR. In light of the "Good" rating assigned to MBCR for its accident history, I have no

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[9] Chaville RD (2006) (passenger died after jumping from a moving train; reports suggest there were questions about whether a door-locking mechanism should have been in place); Ponte-Nuovo/Casamozza (2007) (five injured when two trains collided at low speed); Allinges (2008) (bus hit at a grade crossing, causing seven deaths and three injuries; after Keolis submitted its SOQ, SNCF was found responsible for not having taken steps to make the crossing safer).

[10] While MBCR repeatedly takes issue with Keolis' disclosures, MBCR's own description of its Chatsworth accident is notably circumspect. MBCR's submission discloses that the accident resulted in 25 fatalities, but makes no reference to the 28 serious and 72 minor injuries to passengers and crew. Its description of the accident states that the operating engineer was sending text messages "before the accident" and that the NTSB found "human factors were the cause of the accident," but does not disclose that the operating engineer's last text message was sent just 22 seconds before the accident, when the operating engineer was exchanging text messages with a minor child "rail fan" who was planning to join the operating engineer in the locomotive cab later that evening and operate the train (as the minor child had done on at least one previous occasion). MBCR provided pieces of accurate facts (according to MBCR's submission, there was "no judicial determination as to the cause of the accident" and "all eye witnesses testified that the operating signal had been green"), but omitted the more salient details that (1) the NTSB unequivocally found that Connect Railroad, Inc. (a unit of Veolia Transportation, Inc.) was at fault; (2) the eye witnesses could not have reliably seen the red aspect displayed as the train left the station because of "extreme distance," lighting conditions, and the "limitations of the human visual system"; and (3) according to the NTSB, "physical evidence, documentary and recorded data, and post-accident signal examination and testing" confirmed that the signal was, in fact, red. *See* NTSB Accident Report RAR-10/01 (Jan. 1, 2010), available at https://www.ntsb.gov/doclib/reports/2010/RAR1001.pdf.

trouble concluding that disclosure of the three SNCF events would not have caused the MBTA to downgrade its rating of Keolis' accident history or to disqualify it from further consideration.

b. Safety plans

MBCR argues that Keolis lacks a "demonstrated" safety plan and that Keolis' references to its operation of the Virginia Railway Express ("VRE") are irrelevant because the VRE system is much smaller than the Massachusetts Bay commuter system.

MBCR isolates the word "demonstrated" in the Operational and Management Proposal Rated Evaluation Factors description, and then argues that Keolis and SNCF lack a "demonstrated" safety plan because, among other things, they have not submitted any safety data that show their plans work. However, the RFP does not require the submission of safety data. It requires the submission of information sufficient to show the integration of safety into all aspects of operations and plans to handle safety incidents and develop accident reduction plans in partnership with the MBTA. Keolis did this. Further, I see no reason to discount the VRE case study based on size alone, as MBCR argues. The scale of the VRE operation does not render the experience wholly uninformative.

c. Security plan

MBCR interprets the RFP as requiring a fully developed security plan, and then argues that the Keolis submission "amounted to little more than SNCF/Keolis would talk to the MBTA Police and/or set up a committee." MBCR quotes a number of forward-looking statements made by Keolis as proof that it did not even attempt to submit a functional plan that addressed the criteria of the RFP.

The RFP did not require submission of a deployment-ready, fully operational plan. It required a "plan demonstrating accountability for the security of the system. . . ." The Keolis plan did that, in part by acknowledging its responsibility to work closely with the MBTA Transit Police to develop a plan that adopts and incorporates Transit Police security policies, goals, and objectives. As a practical matter, it would be impossible for a non-incumbent to develop a security plan without such collaboration because only the incumbent has access to critical, non-public information such as the MBTA's System Security Plan and Sensitive Security Information guidelines and procedure. This is why both the RFP and the case law allow for a "tooling up" period.

Moreover, the Operating Agreement provided that the Operator System Security Compliance Plan, which MBCR specifically challenges in its protest, be submitted "not more than 90 days *after* issuance of the Notice to Proceed." Under the Operating Agreement, the Director of Railroad Operations, in consultation with the MBTA Security Department and the MBTA Transit Police Department, will then review the plan, and either approve the plan or, within 30 days, direct the Operator to revise the plan. The Operator must then revise its plan accordingly within 30 days of receipt of revisions from the MBTA. "Tooling up" is the norm when a new operator takes over; otherwise an incumbent would have an unfair and insurmountable advantage.

Based on the Proposal before it, and the knowledge that a fully operational plan was not required until 90 days after the Notice to Proceed issued, the Selection Committee's determination that the Keolis plan was "Acceptable" was within its broad discretion.

d. Diversity requirements

i. Equal Employment Opportunity

MBCR argues that Keolis failed to submit an affirmative action plan that complied with FTA Circular 4704.1, a fact MBCR alleges the MBTA recognized but ignored during the evaluation process.

Overall, Keolis' Equal Employment Opportunity rating was "Acceptable." As required by O&M Proposal Instruction B.12.2(B), Keolis submitted a draft affirmative action plan. The Selection Committee rated the subfactor concerning its affirmative action plan "Potential to Become Acceptable." The weaknesses noted by the Selection Committee, and borne out in my review of the Keolis submission, are related to a lack of detail concerning Keolis' Utilization Analysis and Goals. The Selection Committee attributed these issues, at least in part, to the fact that Keolis "has not been previously required to submit an [affirmative action plan]."

However, Keolis has demonstrated its commitment to equality of opportunity and diversity in the workforce. Its approach to equal employment opportunities met the RFP criteria. The Selection Committee's rating of "Potential to Become Acceptable" on Keolis' draft affirmative action plan and its overall rating of "Acceptable" – which was reached in conjunction with "Acceptable" ratings for the remaining two subfactors – were reasonable.[11]

ii. Disadvantaged Business Enterprises Plan

MBCR alleges that the Keolis Disadvantaged Business Enterprises ("DBE") plan was unacceptable and that when Keolis did not submit an acceptable DBE plan during the discussion and negotiation phases, the MBTA changed the terms of the Operating Agreement to require a "completed DBE plan" after the agreement was signed. MBCR is also critical of the number of DBE firms included in Keolis' Proposal.

The MBTA and Keolis did revise the draft Operating Agreement to require Keolis to submit its DBE plan to the MBTA for approval. The newly-added section provides a mechanism through which the MBTA can review and require revisions to the plan. The final rating for Keolis on its DBE plan was "Acceptable," a rating that recognizes there is some weakness to the Proposal. The Operating Agreement was revised to cement Keolis' commitment into a contractual obligation, thereby ensuring that Keolis' DBE plan, when fully developed, would reflect its commitment to diversity in the workforce.

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[11] A "Potential to Become Acceptable" rating "is appropriate if the Proposer has demonstrated an approach that fails to meet stated criteria as there are weaknesses, but they are susceptible to correction through Discussions. The response is considered marginal in terms of the basic content and/or amount of information provided for evaluation, but overall the Proposer is capable of providing an acceptable or better Proposal."

MBCR criticizes Keolis' reliance on "just seven (7) DBE firms (as opposed to MBCR's 55)" as among the "obvious deficiencies" in Keolis' DBE plan and further argues that these seven firms are incapable of performing the proposed scope of work. Though the Selection Committee identified the use of seven firms as less than ideal, it emphasized that Keolis committed to a DBE rate of 17%, which exceeded the 15% goal stated in the RFP.[12] MBCR criticizes the ability of three of the Keolis-identified firms to grow to accommodate the amount of work Keolis proposed. MBCR's predictions about future growth potential appear to be "worst case" predictions, and fail to account for beneficial inputs Keolis will obtain from the MBTA's deep experience in this area. Keolis' commitment is strong – in fact, Keolis had more dollars assigned to DBE than MBCR did.

I agree with the Selection Committee's conclusion that while there were weaknesses in the Keolis DBE plan, notably an "apparent misunderstanding of certain sections of the regulations," the "good faith efforts presented are reasonable and its commitment to facilitate the growth of DBEs through best practices and innovative approaches are sound." Keolis' Proposal included the necessary elements of its plan and demonstrated a commitment to engaging DBE firms pursuant to the MBTA's goals.

In the case of both Equal Employment Opportunity and Disadvantaged Business Enterprises, a ten-year incumbent like MBCR has an obvious advantage in terms of existing relationships and experience. But the Selection Committee was within its discretion to conclude that Keolis could readily "tool up" to close the experience gap enjoyed by MBCR. The MBTA has a long and successful history of working with DBE-designated businesses through the MBTA's Office of Diversity and Civil Rights, and that office will work with Keolis just as it has worked with MBCR. Given Keolis' commitment to diversity and the MBTA's extensive experience working with designated contractors, the weaknesses identified in Keolis' diversity-related submissions will likely soon be overcome, and Keolis has made the necessary contractual commitments ensuring that they will be overcome. This is sufficient to support the ratings the Selection Committee assigned to Keolis in these categories.

e. The management team

MBCR asserts two grounds for protest relating to the substance of Keolis' Proposal regarding the Management evaluation factor. First, MBCR alleges that two of the eight members of Keolis' proposed management team lacked the requisite professional qualifications identified in the Contract. According to MBCR, the deficiencies should have disqualified Keolis' bid. Second, without any stated factual basis, MBCR alleges that Keolis intentionally misled the MBTA by proposing an "illusory" management team that included people Keolis knew had no intention of joining the project. Neither ground has merit.

The RFP directed each Proposer to submit resumes for its management team showing "commensurate experience" for the job qualifications stated in the Contract, a flexible standard

[12] It is important to note that 15% is a goal, not a requirement. DOT "strongly cautions . . . against requiring that a bidder meet a contract goal (*i.e.*, obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith showing." 49 CFR Part 26, Appendix A(III).

that of necessity incorporates an element of judgment. Ultimately, as with any team, each Proposer's management team was evaluated based on the strengths and weaknesses of the team *as a whole*, and then assigned a single rating that was built into the overall rating for the Management evaluation factor. The Selection Committee recognized some weaknesses in Keolis' proposed team (and also found weaknesses in MBCR's team), but concluded that they were more than offset by significant strengths of other team members.[13] I find that the MBTA's handling of this issue was consistent with the RFP's stated guidelines governing the Selection Committee's evaluation of the Proposals.

MBCR offers no basis for its assertion that Keolis proposed an "illusory" management team. It is common knowledge that the job market for senior executives in the rail transportation industry is fluid. At various times, senior executives of both Proposers have stepped out of the picture. Indeed, at a critical time in this procurement, MBCR's then-General Manager left MBCR and was replaced by an "acting" General Manager. Nevertheless, in its sound discretion, the MBTA allowed MBCR's Proposal to remain under consideration. I conclude that the MBTA acted reasonably and even-handedly in applying the same flexible standard to both Proposers' proposed management teams.

7. **Claims regarding allegedly improper communications with Keolis**

MBCR asserts that the MBTA had improper communications with Keolis; that these improper communications helped to "cover up" shortcomings in Keolis' bid; and that these communications evidence disparate treatment by the MBTA. I address each of these in turn, below.

First, the official, written procedures in place for this procurement permitted Gerald Kelley, the MBTA's First Deputy General Counsel and the sole designated MBTA point of contact for the procurement, to communicate with both Keolis and MBCR. Mr. Kelley regularly communicated with MBCR as well as Keolis, so the mere fact that such communications took place does not show any impropriety on the part of Mr. Kelley or on the part of either Proposer.

Second, with respect to the particular communications challenged by MBCR, it provides no basis for its claim that the purpose of the communications was to "cover up" a deficiency in Keolis' bid. This is mere speculation and innuendo on the part of MBCR. In fact, as discussed in Section 5 above, the feature of Keolis' bid that MBCR labels as deficient, and therefore needing to be hidden (according to MBCR), was not problematic.

Third, the fact that Mr. Kelley was authorized to communicate with, and did communicate with, both Keolis and MBCR does not evidence "disparate treatment" or favoritism to either bidder. Such controlled, authorized official communications between a designated contact person and a Proposer are the norm in a complex procurement such as the one in question. If a successful bid challenge could be built by isolating any particular exchange and

[13] Referring specifically to perceived weaknesses of Keolis' proposed Chief Mechanical Officer, the Selection Committee's consensus evaluation report noted that the "strong management at the top of the organization does compensate for that shortcoming."

claiming disparate treatment and "cover up" even where, as here, the exchange was authorized, few awards would go unchallenged.

The analysis above disposes of the matter, but one additional observation is in order. A fair reading of the relevant documents, all of which have been made available to MBCR, shows that if Keolis had not withdrawn its question, Keolis' confidential financial information necessarily would have been revealed to MBCR. This is so because the MBTA was required to provide *both* Proposers with written answer to questions of this type. The confidential financial information that would have been revealed would have itemized Keolis' ownership structure and disclosed other sensitive information of a type that both Proposers went to great lengths to protect. For example, when MBCR submitted information about its ownership structure and other financial information, it provided a cover sheet stating:

> **DOCUMENT CONTAINS CONFIDENTIAL, PROPRIETARY OR TRADE SECRET INFORMATION**
>
> Massachusetts Bay Commuter Railroad Company, LLC ("MBCR") has marked documents responsive to the Massachusetts Bay Transportation Authority's Request for Proposal No. 159-12, Commuter Rail Services that it has determined to contain confidential, proprietary or trade secret information. These documents have been so marked and are identified below. The documents marked as "CONFIDENTIAL, PROPRIETARY OR TRADE SECRET INFORMATION" contain sensitive financial and business information regarding the business, assets, financial condition, trade secrets, technical knowledge and business arrangements of MBCR and the businesses of the members of MBCR. This information has a unique and valuable character to the company and the member that is providing it and the company and such member would suffer significant irreparable harm and be put at a competitive disadvantage if this information were publicly available to its competitors.

MBCR's own insistence upon confidentiality, among other things, made it essential for the MBTA to safeguard such sensitive financial information, and the MBTA did so in an evenhanded manner for both Keolis and MBCR.[14] No inference of favoritism or disparate treatment arises when, in accordance with the rules, the MBTA's official designated contact person alerts an unaware bidder that its confidential financial information would be disclosed to a rival bidder unless the inquiring bidder's formal question is withdrawn, and then allows that bidder to withdraw the unanswered question. The facts and arguments offered by MBCR provide no support for its claim of disparate treatment, and I find that Mr. Kelley acted reasonably, responsibly, and in conformance with the rules governing the procurement.

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[14] While not part of MBCR's bid protest, it is a matter of public record that MBCR filed a lawsuit seeking to block public disclosure of MBCR's financial information, even after the procurement was complete. *Massachusetts Bay Commuter Railroad Co., LLC v. Massachusetts Bay Trans. Co.*, C.A. No. 2014-00160-BLS2 (Suffolk Super. Ct.). It seems inconsistent, to say the least, for MBCR to seek to protect its own information so zealously while charging the MBTA with impropriety when it takes reasonable steps to prevent inadvertent disclosure of identical information belonging to Keolis.

8. **The claimed shortcomings in the Independent Cost Estimate**

To assist the MBTA in assessing the Financial/Price Proposals, an Independent Cost Estimate (the "ICE") was developed for the MBTA by KPMG Corporate Finance, LLC ("KPMG") and Steer Davies Gleave ("SDG"). Both KPMG and SDG are experienced and reputable consulting firms, and the MBTA's reliance upon these specialized consultants added additional layers of expertise and objectivity to the evaluative process, including with respect to the ICE.

The ICE served as an independent estimate of the cost to operate and manage the commuter rail system in accordance with the requirements of the RFP. This assisted in evaluating the reasonableness and balance of the Financial/Price Proposals. The ICE was developed prior to receipt of Proposals using publicly available industry information, MBTA documentation on its commuter rail operations, and information from other data sources.

The ICE was developed to be compatible with the FFP Forms submitted by Proposers. The FFP Forms are a series of pricing spreadsheets - eight of which cover a single year of the Contract (Year 1, Year 2, Year 3, etc.), and a separate spreadsheet contains a summary of all eight years and an additional four years of option year prices. Each year of the Contract was divided into seven major cost categories representing key cost elements of the commuter rail operations: (i) Administration/HR; (ii) Stations, Retail and Public Information; (iii) Transportation Services; (iv) Mechanical Services; (v) Engineering Services; (vi) Environmental Services and Utilities, and (vii) General Security-Station/Depot. These detailed components were then aggregated to make the final ICE determination.

The ICE was $4,349,099,293. The MBTA measured each Proposer's Best And Final Offer (BAFO) Price Proposal against the ICE to assess the reasonableness of both Proposals. Keolis' 12-year BAFO price was $91 million (-2.1%) less than the ICE; MBCR's 12-year price was $163 million (+3.7%) higher than the ICE. The MBTA determined that both Financial/Price Proposals fell within a reasonable range.

Despite the fact that both Proposers submitted Proposals that deviated from the ICE by less than 4%, and despite the fact that the ICE fell comfortably near the average of both Proposals, MBCR's protest argues that the ICE was not sound. However, the ICE served only as a benchmark, and like all benchmarks it was not required to be surgically precise. I conclude that the MBTA's decision that the ICE was sound is borne out by the facts, and in any event lies well within the reasonable judgment of the MBTA. MBCR's Protest on this ground is therefore rejected.

Finally, MBCR attempts to supplement the procurement record by providing its own, after-the-fact adjusted ICE that MBCR asked an outside expert to develop in order to support MBCR's bid protest. While such an after-the-fact, partisan analysis is not properly part of the record before me,[15] it must be noted that if it were a proper benchmark, MBCR's ICE would

[15] The same is true of the report submitted by MBCR in support of its allegations concerning Keolis' security plans, which I discussed in Section 6(c).

establish that MBCR's own proposal was seriously underpriced and would have caused MBCR to operate at a substantial loss. This seems unlikely in view of MBCR's efforts to continue pursuing the Contract. In any event, I have given MBCR's newly submitted ICE no weight in my review.

9. Miscellaneous additional issues referenced in the bid protest

MBCR's voluminous submissions also touch upon a number of minor, miscellaneous issues that are mentioned in passing but then not developed or substantiated. I am not required to make determinations on issues that are not seriously advanced by MBCR, or if seriously advanced are not sufficiently developed or substantiated. However, to be fair to MBCR I have considered these numerous miscellaneous issues for what they are worth, and I have concluded that no issues beyond those I have previously addressed merit more in-depth treatment here.

10. Conclusion

The MBTA's procurement process consumed more than two years, and it required significant commitments of time and energy from the MBTA's employees, executives, and Board members. The process was carefully designed to ensure fairness in the competitive bidding process and to maximize the benefits produced by that intense competition. Peak efficiency was gained by utilizing the MBTA's substantial internal expertise to evaluate highly technical areas, while also relying on specialized consultants to provide broad analysis and deep perspective where appropriate. The MBTA's goal was to award the Contract to the most qualified proposer that provided the best combination of technical quality and price, and the MBTA succeeded in attaining that goal.

On the technical side of the "best value" equation, each bid was evaluated on eleven different factors. Keolis' ratings were equal to or better than MBCR's ratings in all categories but one. Keolis was therefore rated, overall, "Good"; MBCR was rated, overall, "Acceptable." With respect to price, Keolis again offered a much better value proposition – Keolis' price was lower overall by approximately $254 million for the base term with the full four-year option.

These circumstances do not present a close call. Under the circumstances, an award to MBCR would have been inexplicable. I conclude that the MBTA's decision to award the Contract to Keolis was not arbitrary or capricious; I further conclude that MBCR's grounds for protest have not been supported; and I uphold the MBTA's award of the Contract to Keolis.

Very truly yours,

Silvio Petraglia

Silvio Petraglia
Chief Procurement Officer